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Professor Jeffrey MacIntosh
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BUSINESS ORGANIZATIONS NOTES AND SYLLABUS

PROFESSOR JEFF MACINTOSH
UNIVERSITY OF TORONTO
FACULTY OF LAW
FALL 2007

INTRODUCTORY STUFF

WHEN AND WHERE

Tuesday and Thursday, 10:30 AM – 12:20 PM

Moot Court Room

TWEN (THE WEST EDUCATION NETWORK)

I will be using the TWEN facility maintained by Westlaw/*e*CARSWELL (and not Blackboard, as indicated in the syllabus). Go to http://www.westlawecarswell.com/lawschool/) and click on "TWEN: The West Education Network" on the right-hand side of the page. Log in using the Westlaw/*e*CARSWELL student password that you got from the library. You will need a course password to get in, and I will e-mail that out once I have the class list.

YOU NEED TO REGISTER ON TWEN TO HAVE ACCESS TO THIS FACILITY. I will set it up so that you can register any time during the term.

TWEN gives you on-line access the course syllabus, course materials (at least the ones that I have in electronic format), related articles, web links, etc. It will also enable you to view announcements related to the course. I will also, from time-to-time, post topical newspaper articles and whatever else I am moved to post by the whim of the moment.

TWEN also allows you to post questions related to the course, and me to answer them.

Finally, TWEN provides a chat room facility so that you can duke it out with your fellow students over subtle (or not-so-subtle) points of law in real time. Just get yourself in Doonesbury space (*"By God, I Love the Law!"*)

MATERIALS

1. Harris, Daniels, Iacobucci, Lee, MacIntosh, Puri & Ziegel, Cases and Materials on Partnerships and Canadian Business Corporations (Toronto: Carswell, 2004) (referred to below as "Harris")

2. Canada Business Corporations Act ("CBCA"), 2004 (referred to below as "CBCA")

3. MacIntosh, Business Organizations Supplementary Materials, Fall 2007 (referred to below as "Supp.")

OFFICE HOURS

I don't have specific office hours. If you would like to speak to me, please either see me after class, e-mail me at j.macintosh@utoronto.ca and/or jeff.macintosh@sympatico.ca, or phone me at 416 978-5795. We can then set up a time to meet.

My office is Room 421 in Flavelle House (one of the decadently outfitted new offices on the third floor of the building).

DOING RESEARCH ON CORPORATE LAW

The various statutes (and regulations), including the CBCA and other corporate statutes, may be found in a variety of sources. The web site http://www.lexum.umontreal.ca/index_en.html allows you to search all of the laws of the federal government and the provinces on-line. Further, the CBCA and related regulations may be accessed at http://laws.justice.gc.ca/en/C-44/index.html. In addition, all jurisdictions have their own official legislative web sites. LexisNexis/Quicklaw (http://www.lexisnexis.ca/lawschools/lawschools.php) and Westlaw/Ecarswell (http://www.westlawecarswell.com/lawschool also contain databases with all federal and provincial laws. A word of caution, however; these on-line sources (even the official provincial and federal web sites) may not be entirely up to date.

Cases may be found in searchable form on LexisNexis/Quicklaw or Westlaw/Ecarswell, as well as in the CCH Canadian on-line materials.

U.S. materials are also accessible on either Westlaw/Ecarswell or LexisNexis/Quicklaw. The library will give you a free password for any of these on-line services.

With respect to Canadian textual materials, there are regrettably few sources, and no entirely up-to-date source. The most recent and perhaps the most student-friendly is Anthony VanDuzer, The Law of Partnerships and Corporations (Toronto: Irwin, 1997), which tracks this course quite closely in terms of its organization and selection of cases. You might also want to look at Bruce Welling, Corporate Law in Canada, the Governing

Principles (2d ed.) (Toronto: Butterworths, 1991) (which is now somewhat outdated, especially for oppression remedy cases); Tom Hadden, Robert E. Forbes, and Ralph L. Simmonds, Canadian Business Organizations Law (Toronto: Butterworths, 1984) (which is even more outdated); and Frank Iacobucci et al., Canadian Business Corporations: An Analysis of Recent Legislative Developments (Agincourt, Ont.: Canada Law Book, 1977) (yet more outdated, but containing the most useful policy analysis).

The best Canadian corporate law text ever written (at least from a black letter law perspective) is, without question, Franklin W. Wegenast, The Law of Canadian Companies (Toronto: Burroughs and company, 1931). While it is rarely now consulted because of its date of publication, it is tremendously useful for research on Canadian and English company law up to 1931.

For English law, see Brian R. Cheffins, Company Law: Theory, Structure, and Operations (Oxford: Clarendon Press, 1997); Paul L. Davies, Gower and Davies' Principles of Modern Company Law, 7th ed. (London: Sweet & Maxwell, 2003). The first contains cases as well as a sophisticated law and economics analysis. The second has for a long time been the standard black-letter reference for English law, and is widely cited by the courts.

EVALUATION

Evaluation will be by a 3-hour open book examination that will consist of a combination of essay, fact pattern and short answer questions. There will be *both* "black letter law" questions *and* a policy-oriented essay question.

THE SYLLABUS

MODULE 1: INTRODUCTION TO CORPORATE LAW AND CORPORATE GOVERNANCE

1. Introductory Concepts

a. Outline of Constituencies with an Interest in the Corporation (purpose: to define the scope of corporate law, as opposed to other branches of the law)

b. Limited Liability

CBCA ss. 45(1)

c. What is a common share? A preferred share? A bond? How do these differ in risk and expected return? How many permutations and combinations of rights can you have?

CBCA ss. 24

d. What is a "private" company? A "public" company? (and the correlative concepts of "distributing" and "non-distributing" corporations in the CBCA)

Harris pp. 168-70
CBCA ss. 2(1) (definition of "distributing corporation")
CBCA Regulation s.2(1)

e. Capital Markets; Primary and Secondary (including a brief description of the Canadian stock exchanges)

f. Types of Traders: Retail and Institutional

g. The Constitutional Basis of Provincial and Federal Corporate Law (Constitution Act, s.92(11), and s.91 - POGG)

Harris pp. 62-64

h. The Regulatory Landscape: The Corporate Regulators and the Securities Regulators

Harris pp. 58-60
CBCA ss. 2(1) (definitions of "*D*irector" and "*d*irector")

2. *The Legal Model of "Corporate Governance": Shareholders as Owners, Directors and Officers as Agents (shareholders rule, okay?)*

    CBCA s.102 (directors to manage or supervise management)
    CBCA ss. 106(3) (shareholders to elect directors)
    CBCA Part XV ("Fundamental Changes" – do a quick skim just to get an idea of what kinds of fundamental changes shareholders get to vote on)

3. *The Nihilist View of Berle and Means (Adolf A. Berle and Gardiner C. Means, <u>The Modern Corporation and Private Property</u> (1932)) et al.*

    Harris, pp. 207-222

    a. separation of ownership and control
    b. "collective action" and "free riders" problems
    c. management as self-perpetuating satrapy
    d. shareholders as disinterested sheep, shareholder voting as useless exercise
    e. agency costs: shirking and perquisite consumption

4. *Responses to Berle and Means*

    a. Outside, Independent, and Unrelated Directors

        CBCA ss. 102(2)

    b. Market discipline of Management (product, capital, control, and managerial labour markets)

    c. Institutional Investors

5. *The Role of Corporate Law*

    a. The Overriding Efficiency Goal (allocative efficiency, transactional efficiency, and informational efficiency, low agency costs)

    b. The Two Competing Views of the Purpose Served by Corporate Law

        i. The Mandatory and Enabling Views
        ii. The Different Mechanisms of the Mandatory and Enabling Views
        iii. The Different Efficiency Premises of the Mandatory and Enabling Views

    c. Does the Empirical Evidence Favour One View or the Other?

    d. The Charter Shopping Debate in Corporate Law: A Joint Test of Whether Law Matters and Whether the "Charter Market" is Good or Bad

Harris, pp. 163-68
CBCA ss. 187, 188

6. *The Distinctiveness of Canadian Capital Markets*

Harris pp. 60-61

7. *Different Forms of "Off-the-Rack" Rules: Corporations, Partnerships, Limited Partnerships, Sole Proprietorships*

MODULE 2: MORE INTRODUCTORY CONCEPTS

1. *More Introductory Concepts*

a. *The Corporate Constitution: The Articles of Incorporation, the By-Laws, and the Unanimous Shareholder Agreement (and their analogues in Memorandum Jurisdictions and Letters Patent Jurisdictions)*

Harris pp. 55-58, 172-73, 175-79, 179-80

CBCA ss. 2(1), 6(1), 6(2), 146 (definitions of "articles", "unanimous shareholder agreement")

CBCA ss. 173(1) (amendment of articles by special resolution)

CBCA 103 (by-laws)

b. *Annual Meetings and Special Meetings*

CBCA ss. 133, 135(5), 165 (removal of auditor at special meeting), 109 (removal of directors)

c. *Ordinary and Special Resolutions*

CBCA ss. 2(1) (definitions of "ordinary" and "special" resolution)

d. *De Jure and De Facto Control*

e. *"Management Controlled" (or "Widely Held") Corporations*

MODULE 3: THE TRADITIONAL MODEL OF CORPORATE GOVERNANCE AND ITS CRITICS

1. *The Black Letter Legal Model of the Corporation*

a. *The Powers of Shareholders and the Powers of Directors*

General: Harris, pp. 223-24

CBCA ss. 102, 103

Kelly v. Electrical Construction (1907), 16 O.L.R. 232 (Ch. D.) (Harris, pp. 230-32)

Note (Harris, p. 232)

NOTE: *Kelly* raises the question of what powers shareholders are given by statute. Some of the most important shareholder powers in the CBCA are:

CBCA ss. 106(3) (election of directors)
CBCA s.109 (removal of directors)
CBCA Part XV ("Fundamental Changes")
Common law shareholder power to ratify voidable acts of directors (see Chapter 7 re fiduciary duties)
CBCA ss. 135(5) (at annual meeting, shareholders elect the auditor, and must approve the annual financial statements)
CBCA s.137 (shareholder proposals)
CBCA s. 137(1)(b) (shareholder right to discussion)

b. *Are Directors the <u>Legal</u> Agents of Shareholders?*

Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame, [1906] 2 Ch. 34, 75 L.J. Ch. 437 (Eng. C.A.) (Harris, pp. 232-34

Notes and Questions (Harris, pp. 234-35)

NOTE: the *Cuninghame* case took place in a *memorandum* jurisdiction. Note the two differences from articles of incorporation jurisdictions; i) shareholders possess residual powers; ii) "contractual" basis of memorandum companies.

c. *Internal Delegation of Directors' Powers*

Hayes v. Canada-Atlantic & Plant S.S. Co., 181 F. 289 (1st Cir. 1910) (Harris, pp. 235-238)

CBCA ss.115, 121, 122(1)

Question: Are *Hayes* and the CBCA provisions governing delegation mutually exclusive?

Question: Is *Hayes* binding on Canadian courts?

d. *External Delegation of Directors' Powers*

Sherman & Ellis v. Indiana Mutual Casualty, 41 F.2d 588 (7th Cir. 1930) (Harris, pp. 238-39

Kennerson v. Burbank Amusement Co., 260 P.2d 823 (Calif. C.A. 1953) (Harris, pp. 239-41)

Question (Harris, p. 241

CBCA ss.102, 122(1)

Question: Are there policy reasons for placing limits on external delegation?

e. *Employment Contracts and Director/Officer Tenure*

Note (Harris, p. 423)

Realty Acceptance Corp. v. Montgomery, 51 F.2d 636 (3rd Cir. 1930) (Harris, pp. 241-244)

Southern Foundries v. Shirlaw, [1940] 2 All E.R. 445, [1940] A.C. 701 (H.L.) Harris, pp. 244-47

Shindler v. Northern Raincoat, [1960] 2 All E.R. 239, [1960] 1 W.L.R. 1038 (Harris p. 247)

CBCA ss. 106(3), 121

f. *Removal of Directors*

CBCA ss. 6(4), 109, 140(1), 24(3), (4)

Bushell v. Faith, [1970] A.C. 1099, [1970] 1 All E.R. 53 (H.L.) (Harris, pp. 224-230)

Questions: Was the House of Lords correct on legal grounds? Were they correct purely from a policy perspective? What would the result be if *Bushell* was litigated in Canada?

Question (Harris, p. 230)

MODULE 4

1. *The Fundamental Characteristics of Corporations*

CBCA ss.5, 8, 9, 15, 16, 17, 18, 45

Canada Interpretation Act, s.21 (Harris p. 68)

2. *Why Incorporate (versus carrying on business in some other form)?*

a. All of the above fundamental characteristics, but especially limited liability and perpetual succession (which facilitates estate planning)
b. More elaborated "off-the-rack" rules
c. Tax considerations
d. Generally, easier transferability of rights
e. Allows for creation of greater range of investment instruments
f. Disciplinary structure
g. Use of shares as "currency" to effect acquisitions (especially for public companies)
h. Ability to use shares/options etc. as managerial incentives (especially public companies)

3. *Disadvantages for Private Corporations*

a. Cost of incorporating (minor problem)
b. Formalities (directors and shareholders meetings, minute books of directors and shareholders meetings, share registers, etc).
c. Financial Statements (CBCA s.155) (publicly filed for distributing corporations per CBCA s.160)
d. Restrictions on Foreign Directors (e.g. CBCA 105(3), (4))

4. *Disadvantages for Public Corporations*

a. All of the above
b. Cost of going public (especially prospectus cost)
c. Application of securities regulation (applies mostly, although not exclusively to public corporations); significantly increases the cost of carrying on business

d. Cost of public disclosure/public relations
e. Enhanced exposure to minority shareholder suits/class actions
f. Loss of confidentiality via public disclosure requirements

MODULE 5: The Nature of Corporate Legal Personality and its Consequences

1. Introductory Concepts

a. The corporate balance sheet
b. Nominal or authorized capital versus issued capital
c. Floating charge security

2. The Corporation as a Separate Legal Entity

Salomon v. Salomon & Company, [1897] A.C. 22, 66 L.J. Ch. 35 (H.L.) (Harris, pp. 68-73)

Notes (Harris, pp. 73-75)

Question: How could the nominal sale price have been [pounds] 40,000, when the company was only worth a fraction of that?

Question: How important was it that at the time the incorporation all "old" creditors were paid off?

Question: Should the court have subordinated the debenture to the interests of other creditors, given that Salomon was a shareholder as well as the principal creditor (i.e. should there be "equitable subordination")?

Question: What is the *ratio* of *Salomon*? Did it create limited liability for corporations?

3. The Consequences of Legal Personality (or lack thereof); Corporations versus Partnerships

Lee v. Lee's Air Farming, [1961] A.C. 12, [1960] 3 All E.R. 420 (P.C.) (Harris, pp. 75-77)

Re Thorne and New Brunswick Workmen's Compensation Board (1962), 33 D.L.R. (2d) 167 (N.B.S.C., A.D.) (Harris, pp. 16-21)

Question: Do the contrasting results in these two cases make sense from a policy point of view?

4. *The Consequences of Legal Personality: Insurance (and the Shareholder's Interest in Corporate Assets)*

Macaura v. Northern Assurance Co. Ltd., [1925] A.C. 619, [1925] All E.R. Rep. 51 (H.L.) (Harris, pp. 77-82)

Kosmopoulos v. Constitution Insurance Co. (1983), 149 D.L.R. (3d) 77 (Ont. C.A.) (Harris, pp. 77-83)

Kosmopoulos v. Constitution Insurance Co., [1987] 1 S.C.R. 2 (S.C.C.) (Harris, pp. 83-84)

Note (Harris, pp. 84-85)

Questions: What are the policy reasons for and against allowing a single shareholder to insure the assets of the company? What is the danger inherent in giving the kind of remedy given by the court in the *Kosmopoulos* case? Are there any other doctrines that the court might use to reach the same result that the court reached?

5. *Disregard of Corporate Personality in Corporate Law*

Excerpts from Jeffrey G. MacIntosh, "Disregard of Corporate Personality in Canada" (Supp. p. 1)

Question: which of the three classifications explored in MacIntosh do the following cases fall into?

Mesheau v. Campbell (1983), 39 O.R. (2d) 702 (O.C.A.) (Harris, pp. 96-98)

Notes (Harris, p. 98-99)

Clarkson Co. Ltd. v. Zhelka, [1967] 2 O.R. 565 (Ont. H.C.) (Harris, pp. 111-115)

Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd., [1972] 3 O.R. 199 (Ont. C.A.) (Harris, pp. 117-120)

Notes (Harris pp. 120-123)

De Salaberry Realities Ltd. v. MNR (1974), 46 D.L.R. (3d) 100 (Fed. T.D.) (Harris, pp. 123-29)

Jodrey v. Nova Scotia, [1980] 2 S.C.R. 774 (noted in Harris, p. 129-32)

Minister of National Revenue v. Blackburn (1976), 66 D.L.R. (3d) 191 (Fed. C.A.) (note 4 in Harris, p. 134-35)

Downtown Eatery v. R. (2001), 54 O.R. (3d) 161 (Harris, Note 5, pp. 135-36)

6. *Disregard of Corporate Personality in Tort Law*

a. *Imposing Tortious Liability on Directors: General*

ScotiaMcLeod Inc. v. Peoples Jewellers Limited, (1995), 26 O.R. (3d) 481 (Ont. C.A.) (Supp. p. 17)

AGDA Systems International Ltd. v. Valcom Ltd. (1999), 43 O.R. (3d) 101 (C.A.) (Harris pp. 99-106)

b. *The Tort of Inducing Breach of Contract*

Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42 (H.C.J.) (Supp. p. 24)

7. *An Analytical Perspective on Limited Liability*

Halpern, Trebilcock and Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980), 30 U.T.L.J. 117 (Harris, pp. 107-110)

i. *Ultra Vires, Agency Doctrines, and the Indoor Management Rule*

CBCA ss. 15-18

Notes (Harris p. 249-51)

Sherwood Design Services Inc. v. 872935 Ontario Ltd. (1998), 39 O.R. (3d) 576 (O.C.A.) (Harris pp. 259-262)

MODULE 6; CORPORATE GOALS AND SOCIAL RESPONSIBILITY: TO WHOM ARE DIRECTORS' DUTIES OWED?

1. *General*

CBCA s. 122

Note (Harris pp. 262-63)

Dodge v. Ford Motor Company, 204 Mich. 459, 170 N.W. 668, 3 A.L.R. 413 (Del. Ch. 1919) (Harris pp. 263-266

Notes (Harris pp. 266-267)

Miles v. Sydney Meat-Preserving Co. Ltd. (1913), 16 C.L.R. 50 (H.C.A.), affirmed (1914) 17 C.L.R. 639 (P.C.) (Harris pp. 267-268)

Questions (Harris p. 269)

Parke v. Daily News, [1962] 1 Ch. 927, [1962] 2 All E.R. 929 (Ch. D.) (Harris 269-276)

Notes (Harris pp. 276-278)

Theodora Holdings Corp. v. Henderson, 257 A. 2d 398 (Del. Ch. 1969) (Harris pp. 278-280)

Notes (Harris pp. 280-283)

Notes and Excerpts from articles, Harris p. 283-285 (CNR "Run-Throughs" Report); 285-287 (Report of the Royal Commission on Corporate Concentration); 287-288 (E.M. Dodd, "For Whom are Corporate Managers Trustees?"); 290-91 (Richard A. Posner, *Economic Analysis of Law*); 291-93 (Henry Hansmann and Ranier Kraakman, "The End of History for Corporate Law")

2. *Duties Owed to Creditors*

Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461 (Supp. p. 27)

Questions (Harris pp. 298-99)

MODULE 7: THE DUTY OF CARE OWED BY OFFICERS AND DIRECTORS TO THE CORPORATION

1. *Common Law*

Re City Equitable Fire Insurance Co. Ltd., [1925] 1 Ch. 407 (Ch. D.) (Harris, pp. 301-304)

Note (Harris, p. 305)

Re Brazilian Rubber Plantations and Estates, Ltd., [1911] 1 Ch. 425 (C.A.) (Harris pp. 305-07)

Notes (Harris, pp. 307-09)

2. *Statutory Reform: Due Diligence in the Income Tax Context*

Income Tax Act, s.227.1 (Harris p. 311)

Soper v. Canada, [1998] 1 F.C. 1224 (F.C.A.) (Harris pp. 312-319)

3. *Statutory Reform: Corporate Law*

CBCA s. 122(1)(b), 123

Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461 (Supp. p.35)

Note (Harris p. 324)

4. *Statutory Reform: Environmental Obligations*

R. v. Bata Industries Ltd. (1992), 9 O.R. (3d) 329 (Ont. Gen. Div.) (Harris pp. 324-331)

5. *The Securities Regulators' Public Interest Duty of Care*

Note on Public Interest Powers (Harris pp. 331-32)

Re Standard Trustco Ltd. (1992), 6 B.L.R. (2d) 241 (O.S.C.) (Harris pp. 332-348)

Notes (Harris p. 338)

6. *The Explosive Expansion of Statutory Duties for Directors*

Note, and Daniels and Morgan, "Directors Face Grab-Bag of Liabilities" (Financial Post, August 12, 1992 at 40) (Harris, pp. 338-340)

Notes (Harris, p. 340-41)

7. *Other Statutory Director Liabilities in Corporate Law*

Note (Harris pp. 341-342)

8. The Business Judgment Rule

Note (Harris pp. 342-44)

Smith v. Van Gorkum, 488 A.2d 858 (Del. S.C. 1985) (Harris pp. 344-355)

Notes and Questions (Harris pp. 355-358)

Brant Investments v. Keeprite Inc. (1991), 3 O.R. (3d) 289 (C.A.) (Harris pp. 358-367)

Question (Harris p. 367)

Pente Investment Management Ltd. v. Schneider Corp. (1998), 42 O.R. (3d) 177 (C.A.) (Harris pp. 367-368)

9. Indemnification and Insurance

CBCA s. 124

Daniels and Hutton, "The Capricious Cushion: The Implications of the Directors' and Officers' Insurance Liability Crisis on Canadian Corporate Governance" (1993), 22 Can. Bus. L. J. 182 (Harris, pp. 368-372)

Questions (Harris, 373)

MODULE 8: FIDUCIARY DUTIES OWED BY DIRECTORS AND OFFICERS TO THE CORPORATION

1. Introduction to Fiduciary Duties: Fiduciary Duties as Gap-Filling in Incomplete Contracts (Harris pp. 375-76)

2. Self-Dealing Transactions

(a) Introduction to Basic Self-Dealing (Harris pp. 376-77)

(b) The Common Law

Aberdeen Railway Co. v. Blaikie Bros., [1843-60] All E.R. Rep. 249, 2 Eq. Rep. 1281 (H.L.) (Harris pp. 377-78)

Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co., [1914] 2 Ch. 488, 94 L.J. Ch. 94 (C.A.), (Harris pp. 379-81)

Notes (Harris p. 381)

The Liquidators of the Imperial Mercantile Credit Association v. Edward John Coleman and John Watson Knight, [1873] L.R. 7 E. & I. App. 189 (H.L.) (Harris pp. 382-383)

Question (Harris p. 383)

Gray v. New Augarita Porcupine Mines Ltd., [1952] 3 D.L.R. 1 (P.C.), (Harris pp. 383-385)

(c) Legislative Response

CBCA ss. 120, 122, 241

Note on Legislative Response (Harris pp. 385-86)

3. Corporate Opportunities

(a) Introduction to Corporate Opportunities (Harris pp. 386)

(b) The Common Law

Cook v. Deeks, [1916] 1 A.C. 554, 85 L.J.P.C. 161 (P.C.) (Harris pp. 387-391)

Note (Harris p. 391)

Regal (Hastings), Ltd. v. Gulliver, [1942] 1 All E.R. 378 (H.L.) (Harris pp. 392-99)

Notes and Questions (Harris pp. 399-400)

Phipps v. Boardman, [1965] 1 All E.R. 849 (C.A.); *sub. nom. Boardman v. Phipps,* [1966] 3 All E.R. 721 (H.L.) (Harris pp. 400-407)

Notes (Harris pp. 408-410)

Peso Silver Mines Ltd. v. Cropper, [1966] 56 D.L.R. (2d) 117, 59 W.W.R. 329 (B.C.C.A.); affirmed, [1966] S.C.R. 673, 56 W.W.R. 641, (Harris pp. 410-15)

Notes and Questions (Harris pp. 415-16)

Irving Trust Co. v. Deutsch, 73 F. 2d 121 (2d Cir. 1934), (Harris pp. 416-19)

Canadian Aero Services Ltd. v. O'Malley, Zarzycki, [1974] S.C.R. 592, 62 D.L.R. (3d) 635 (Harris pp. 419-425)

Questions (Harris p. 425)

Burg v. Horn, 380 F. 2d 897 (2d Cir. 1967), (Harris pp. 425-428)

Questions and Notes (Harris pp. 428-430)

Brudney and Clark, "A New Look at Corporate Opportunities" (Harris pp. 430-433)

4. Competition

Intro (Harris pp. 433-34)

London and Mashonaland Exploration Company, Limited v. NewMashonaland Exploration Company, Limited, [1891] W.N. 165, (Harris p. 434)

Questions (Harris pp. 435-437)

In Re Thomson, [1930] 1 Ch. 203, (Harris pp. 437-439)

5. Hostile Takeovers and Defensive Tactics by Target Management

(a) Introduction to Hostile Takeovers and Defensive Tactics (Harris pp. 439-41)

(b) Theoretical and Empirical Perspectives

MacIntosh, "The Poison Pill: A Noxious Nostrum for Canadian Shareholders" (Harris pp. 442-44)

Easterbrook and Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer" (Harris pp. 444-50)

Gilson, "A Structural Approach to Corporations" (Harris pp. 450-51)

Romano, "A Guide to Takeovers: Theory, Evidence and Regulation" (Harris pp. 451-60)

Daniels, "Can Contractarianism Be Compassionate?" (Harris pp. 460-464

Notes (Harris pp. 464-65)

(c) The Canadian Common Law on Defensive Tactics: First Pass

Intro (Harris p. 465-66)

Teck Corp. Ltd. v. Millar, 33 D.L.R. (3d) 288, [1973] 2 W.W.R. 385 (B.C.S.C.) (Harris pp. 466-74)

Notes (Harris pp. 474-479)

(d) American Jurisprudence on Defensive Tactics

Note (Harris pp. 479-480)

Unocal Corp. v. Mesa Petroleum Co., 493 A. 2d 946 (Del. S.C. 1985), (Harris pp. 480-84)

Revlon Inc. v. MacAndrews Forbes Holdings Inc., 506 A. 2d 173 (De. S.C. 1985), (Harris pp. 484-91)

Paramount Communications Inc. v. Time Inc., 571 A. 2d 1140 (Del. S.C. 1989) (Harris pp. 491-94)

Notes (Harris p. 495)

(e) Recent Developments in Canadian Jurisprudence After Unocal and Revlon

Pente Investment Management Ltd. v. Schneider Corp. (1998), 42 O.R. (3d) 177 (C.A.) (Harris pp. 495-507

Note (Harris pp. 507-509

(f) The Powers of the Toronto Stock Exchange in Connection With A Share Issuance: A Note on the Torstar and Canada Malting Cases

Harris pp. 509-13

(g) Note: The Toronto Stock Exchange Requirement for Coattail Provisions

Harris pp. 513-516

(h) The Powers of the Securities Regulators in Policing Defensive Tactics

National policy 62-202: Take-over bids - Defensive Tactics (Harris pp. 517-19)

Re Chapters Inc. (2001), 24 O.S.C.B. 1657 (Ont. Sec. Comm.) (Harris pp. 519-526)

MODULE 9: DUTIES OWED BY CONTROLLING SHAREHOLDERS TO MINORITY SHAREHOLDERS

1. *The Concept of Control*

   Note (Harris p. 547)

2. *Why Should We Worry About the Exercise of Power by Controlling Shareholders?*

   Excerpt from Jeffrey G. MacIntosh, *"Corporations"*, in Law Society of Upper Canada, Special Lectures, 1990: Fiduciary Duties, 189 (footnotes omitted)) and accompanying notes (Harris pp. 548-50)

3. *The Strongly Majoritarian Temperament of Early Anglo-Canadian Common Law*

   Excerpt from Jeffrey G. MacIntosh, "Minority Shareholder Rights in Canada and England: 1860-1987" (1989) 27 Osgoode Hall L.J. 561 (footnotes omitted) (Harris pp. 550-52)

   North-West Transportation Company, Limited v. Beatty (1887), 12 App. Cas. 589 (PC.) (Harris pp. 552-56)

   Note (Harris p. 556)

4. *Early English Judicial Attempts to Create a Fiduciary Duty*

   Note and excerpt from Jeffrey G. MacIntosh, "Minority Shareholder Rights in Canada and England: 1860-1987" (1989) 27 Osgoode Hall L.J. 561 (footnotes omitted) (Harris pp. 556-59)

5. *More Recent Canadian Judicial Attempts to Create a Fiduciary Duty*

   Note (Harris pp. 560-61)

6. *The Current Canadian Position with Respect to Fiduciary Duties of Shareholders at Common Law*

Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, 80 D.L.R. (4th) 161 (Ont. C.A.) (Harris pp. 561-64)

Question (Harris p. 564)

7. *Duties Owed by Shareholders Under the Oppression Remedy*

CBCA s. 241

Note (Harris pp. 564-65)

Ebrahimi v. Westbourne Galleries Ltd., [1972] 2 All E.R. 492, [1973] A.C. 360 (H.L.) (Harris pp. 565-570)

Notes (Harris pp. 570-71)

Re Ferguson and Imax Systems Corp., (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), (Harris pp. 571-580)

Notes (Harris pp. 580-82)

Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1959] A.C. 324, [1958] 3 All E.R. 66 (H.L.) (Harris pp. 582-86)

Notes and Questions (Harris p. 587)

Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, 80 D.L.R. (4th) 161 (Ont. C.A.) (Harris pp. 358-67) (re-read the last paragraph from the *Brant* case; what does it say about the existence of a fiduciary duty under the oppression remedy?)

8. *The Duty of a Controlling Shareholder When Tendering Into a Takeover Bid*

Pente Investment Management Ltd. v. Schneider Corp. (1998), 40 B.L.R. (2d) 244 (Ont. Ct. J.) (Harris pp. 587-91)

Note (Harris p. 591)

9. *The Duty of the Board of Directors When There is a Controlling Shareholder*

Pente Investment Management v. Schneider Corp. (1998), 42 O.R. (3d) 177 (O.C.A.) (Harris pp. 591-93)

Notes (Harris pp. 593-94)

10. Majority of the Minority Voting

Note (Harris p. 594)

11. The Role of the Securities Regulators

Note: The Role of the Securities Regulators (Harris pp. 594-96)

Re Canadian Tire (1987), 10 OSCB 857 (Ontario Securities Commission), affirmed by Divisional Court, (1987), 10 OSCB 1771 (Harris pp. 596-600)

Notes (Harris pp. 600-601)

12. Are Controlling Shareholders Good For Canadian Capital Markets?

Note: Are Controlling Shareholders Good For Canadian Capital Markets? (Harris pp. 601-06)

MODULE 10: SHAREHOLDERS' REMEDIES

1. Introduction (Harris pp. 859-61)

2. The Derivative Action

(a) Introduction (Harris p. 861)

(b) At Common Law: The Rule in Foss v. Harbottle and the Derivative Action Distinguished from the Personal Action

Beck, "The Shareholders' Derivative Action" (Harris pp. 862-65)

Note (Harris p. 865)

Beck, "The Shareholders' Derivative Action" (Harris pp. 885-892)

(c) The Statutory Derivative Action

CBCA ss. 238, 239, 240, 242

Note (Harris pp. 865-867)

Goldex Mines Ltd. v. Revill, (1975), 7 O.R. (2d) 2216, 54 D.L.R. (3d) 672 (C.A.), (Harris pp. 897-903)

Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 (Harris pp. 903-06)

Notes (Harris pp. 906-08)

(d) Costs in Derivative Actions

Note (Harris pp. 879-80)

CBCA s. 240

Turner et al. v. Mailhot, (1985), 28 B.L.R. 222 (Ont. H.C.), (Harris pp. 880-82)

Notes and Questions (Harris pp. 883-84)

3. Relief from Oppression

(a) Introduction: The Mischief and Response

Note (Harris pp. 909-10)

Iacobucci, Pilkington and Prichard, *Canadian Business Corporations* (Harris pp. 910-12)

Note (Harris p. 912)

(b) The Canadian Statutory Provisions

CBCA ss. 238, 241, 242

(c) Overlap Between The Oppression Remedy and Fiduciary Duties

Note (Harris pp. 913-14)

(d) Judicial Interpretation of the Action

(i) Standing to Bring an Oppression Action

Note (Harris p. 915)

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 40 B.L.R. 28 (Q.B.) (Harris pp. 915-18)

Notes (Harris pp. 918-21)

(ii) *The Substantive Scope of the Oppression Remedy*

Note (Harris p. 921)

Re-read *Re Ferguson and Imax Systems Corp.*, (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), (Harris pp. 571-580)

Re-read *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492, [1973] A.C. 360 (H.L.) (Harris pp. 565-570)

Note (Harris pp. 924-26)

Westfair Foods Ltd. v. Watt (1991), 79 D.L.R. (4^{th}) 48 (Alta. C.A.) (Harris p. 927-32)

Notes (Harris pp. 932-33)

(iii) *Does the Oppression Remedy Require a Showing Bad Faith?*

Note (Harris pp. 933-35)

(iv) *Is the Oppression Remedy Personal or Derivative?*

Note (Harris pp. 935-36)

Sparling v. Javelin International Ltd., [1986] R.J.Q. 1073 (Harris pp. 936-99)

Notes and Questions (Harris pp. 939-42)

Note (Harris p. 884)

(v) *Can the Oppression Action be Applied to the Conduct of Shareholders of the Corporation?*

This question is addressed in Chapter 7. I will do a brief review here.

(vi) *Costs Orders Under the Oppression Remedy*

Note (Harris pp. 948-49)

(vii) Remedies Under the Oppression Remedy

Stephanie Ben-Ishai and Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995-2001" (Harris pp. 949-50)

Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481 (C.A.) (Harris pp. 950-957)

Note (Harris pp. 957-958)

4. Compliance and Restraining Orders

CBCA s. 247

Note (Harris pp. 958-59)

Goldhar v. Quebec Manitou Mines Ltd., (1975), 9 O.R. (2d) 740, 61 D.L.R. (3d) 612 (H.C. Div. Ct.) (Harris pp. 959-64)

Notes and Questions (Harris pp. 964-65)

MODULE 11: SHAREHOLDERS' RIGHTS

1. Introduction (Harris pp. 685-86)

2. Pre-Emptive Rights (Harris pp.687-690)

3. Shareholder Voting

(a) Introduction (Harris pp. 690-93)

(b) Note on Statutory and Judicial Voting Entitlements (Harris pp. 693-96)

(c) Note on Classification of Shares (Harris pp. 696-97)

(d) Permissible Limitations on the Right to Vote in the Corporation's Constitution

Jacobsen v. United Canso Oil & Gas Ltd., (1980), 11 B.L.R. 313, [1980] 6 W.W.R. 38 (Alta. Q.B.) (Harris pp. 697-708)

Notes (Harris p. 708)

Bowater Canadian Limited v. R.L. Crain and Craisec Ltd., (1987), 62 O.R. (2d) 752 (C.A.) (Harris pp. 708-12)

Notes and Questions (Harris pp. 712-14)

(e) Protection of Non-voting Shares in Takeover Bids (Harris pp. 714-15)

(f) Cumulative Voting for Directors

CBCA s. 107

Note (Harris p. 715)

Report of the Ontario Select Committee on Company Law (Harris pp. 716-18)

Proposals for a New Business Corporations Law for Canada (Harris p. 718)

(g) Right to Appoint Proxy: Herein the Proxy System

(i) Background to Present Legislation (Harris pp. 719-20)

(ii) The Proxy Legislation

Iacobucci, Pilkington and Prichard, "Canadian Business Corporations" (Harris pp. 720-22)

CBCA Part 7

CBCA Regulation, s.57 (just skim; I only want you to get an idea of just how much goes into a management circular), s.61 (ditto)

(iii) The Form of Proxy (Harris p. 723)

(iv) The Concept of Solicitation

Brown v. Duby, (1980), 11 B.L.R. 129, 28 O.R. (2d) 745 (S.C.). (Harris pp. 725-34)

Note (Harris p. 734)

CBCA s. 147

CBCA Regulation, ss. 67-69, which are somewhat opaque, but important, so we will be spending quite a bit of time on these sections

(v) *Critique of the Proxy Provisions* (Harris pp. 734-35)

(vi) *Proxy Solicitation Expenses* (Harris pp. 735-736)

Rosenfeld v. Fairchild Engine & Airplane Corp., (309 N.Y. 168, 128 N.E. 2d 291 (NYCA 1955) (Harris pp. 736-42)

Questions (Harris pp. 742)

(vii) Remedies for Breach of Proxy Legislation

(A) Implied Civil Right of Action (Harris pp. 743-44)

(B) Statutory Liability (Harris pp. 744-45)

(C) Injunctions (Harris p. 745)

(D) Damages (Harris p. 746)

Question (Harris pp. 746-47)

4. Shareholder Meetings

(a) Introduction (Harris p. 747)

(b) Unanimous Shareholders' Resolutions

Eisenberg (formerly Walton) v. Bank of N.S., [1965] S.C.R. 681, 7 C.B.R. (N.S.) 264, (Harris pp. 748-51)

Notes and Questions (Harris pp. 751-52)

(c) The Use of Director's Powers in Relation to Meetings

Schnell v. Chris-Craft Industries Inc., 285 A. (2d) 430 (Del. Ch. (1971); rev'd. 437 (S.C. Del.) (Harris pp. 752-54)

Notes and Questions (Harris p. 754-55)

(d) The Conduct of Meetings and the Right of Discussion

CBCA s. 137(1)(b)

Wall v. London and Northern Asset Corp., [1898] 2 Ch. 469 (C.A.), (Harris pp. 755-58)

National Dwellings Society v. Sykes, [1894] 3 Ch. 159, (Harris pp. 758-59)

Notes (Harris pp. 759-763)

Blair v. Consolidated Enfield Corp., (1993), 15 O.R. (3d) 783 (O.C.A.), (Harris pp. 763-67)

(e) Shareholder Proposals

CBCA s. 137

Notes (Harris pp. 767-72)

Re Varity Corp. and Jesuit Fathers of Upper Canada, (1987), 59 O.R. (2d) 459 (Ont. H.C.), affirmed (1987), 60 O.R. (2d) 640 (C.A.), (Harris pp. 772-75)

Notes and Questions (Harris pp. 775-79)

(f) Judicially Ordered Meetings

Note (Harris pp. 779-81)

Canadian Javelin Ltd. v. Boon-Strachan Coal Co. Ltd., (1977) 69 D.L.R. (3d) 439 (Que. S.C.) (Harris pp. 781-86)

Notes (Harris p. 786)

Barsh v. Feldman, (1986), 54 O.R. (2d) 340 (Ont. H.C.), (Harris pp. 787-89)

Note (Harris p. 789)

(g) Shareholder Requisitioned Meetings

Note (Harris p. 790)

Airline Industry Revitalization Co. v. Air Canada (1999), 45 O.R. (3d) 370 (Commercial List) (Harris pp. 790-798)

MODULE 12: SPECIAL ASPECTS OF THE CLOSELY-HELD OR PRIVATE CORPORATION

1. Introduction (Harris p. 815)

Notes (Harris pp. 818-19)

2. Restrictions on the Transfer of Shares

(a) Statutory and Contractual Provisions

CBCA ss. 6(1)(d), 46, 49(8)

Coates, "Share Transfer and Transmission Restrictions in the Close Corporation" (Harris pp. 820-25)

(b) Judicial Interpretation of Restrictions

Re Smith and Fawcett, Ltd., [1942] 1 All E.R. 542, [1942] Ch. 304 (CA.), (Harris pp. 825-29)

Note (Harris p. 829)

Edmonton Country Club Ltd. v. Case, [1975] S.C.R. 534, (Harris pp. 829-34)

3. Shareholders' Agreements

(a) Introductory Note (Harris p. 835)

(b) Voting Agreements

Clark v. Dodge, 269 N.Y. 410; 199 N.E. 641 (1936), (Harris pp. 836-39)

Ringuet v. Bergeron, [1960] S.C.R. 672, 24 D.L.R. (2d) 449, (Harris pp. 839-43)

(c) Unanimous Shareholder Agreements

Iacobucci, "Canadian Corporation Law: Some Recent Shareholder Developments" (Harris pp. 845-47)

Notes and Questions (Harris pp. 847-50)

Bury v. Bell Gouinlock Ltd., (1984), 48 O.R. (2d) 57 (Ont. H.C.), aff'd (1985), 49 O.R. (2d) 91 (O.C.A.) (Harris pp. 850-53)

Questions (Harris pp. 853-55)

Re 609940 Ontario Inc., Ontario Supreme Court [In Bankruptcy], September 19, 1985, (Harris pp. 855-58)